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IN THE

Supreme Court of the United States

JOHN LONBERG,

Petitioner,

v.

CITY OF RIVERSIDE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The City of Riverside admits that four U.S. Courts of Appeals have addressed the issue presented in this case and have split on the outcome. Nonetheless, the City argues that the issue presented is not important enough to warrant this Court's attention. The City is wrong. First, this issue—whether a person who has been denied access to a public entity's facilities and services can enforce the entity's duty to identify obstacles to accessibility and develop a plan to remedy them—affects on a daily basis the lives of millions of Americans. Second, as explained below, this issue has been the subject of scores of cases in recent years, including cases in two additional circuits where courts have assumed that the transition-plan regulation *is* privately enforceable. Third, individuals with disabilities in those circuits that deny a private right of action are deprived of a congressionally mandated tool to combat the passive discrimination made unlawful by the Americans with Disabilities Act.

The City's failure to implement a transition plan here illustrates why such plans are necessary: 15 years after the congressional deadline for ADA compliance, the City still has thousands of obstacles impeding access for individuals with disabilities. And yet the City thinks that individuals like Mr. Lonberg should have to bear the burden of identifying those obstacles and litigating them, on an obstacle-by-obstacle basis, to remedy the City's unlawful neglect.

Congress intended a different approach. It was Congress that directed the Attorney General to

promulgate regulations consistent with existing Rehabilitation Act regulations, including a transition-plan regulation. While the City erroneously claims that the Attorney General created the right to a transition plan, not Congress, the Attorney General did not add any requirements that were not included in the template that Congress provided in the statutory text itself or, for that matter, take any away. In short, he did not, as the City claims, "play the sorcerer, and not merely the apprentice." City Br. 17.

I. The circuit split furthered by the Ninth Circuit's decision is of substantial importance to millions of Americans with disabilities.

The City admits, as it must, that there is a circuit split as to whether the ADA's transition-plan regulation, 28 C.F.R. § 35.150(d), is enforceable by a private right of action. See, e.g., City Br. 4 (admitting there is a "conflict among four appellate courts"). And while the City claims this is not a "meaningful" circuit split, the issue affects millions of Americans with disabilities: the four circuits that have directly addressed this issue span 23 states and two territories. The outcome of this case will determine whether millions of Americans with disabilities will continue to suffer the very type of passive discrimination that was supposed to end by January 1995. 28 C.F.R. § 35.150(c).

The City further asserts that "there is no indication that the issue arises with any frequency in the lower courts." City Br. 3. That assertion is demonstrably false. Courts in at least two additional circuits have assumed that the transition-plan regulation is privately enforceable, consistent with the Tenth Circuit's decision in *Chaffin* and the

district court's decision below. E.g., *Simpson* v. *City of Charleston*, 22 F. Supp. 2d 550, 555 (S.D. W. Va. 1998) (city had obligation to prepare a transition plan); *Meagley* v. *City of Little Rock*, 2010 WL 1644687, at *2 (E.D. Ark. Apr. 20, 2010) (discussing the enforcement of a consent decree and of transition plans "consistent with federal law").

And the issue has been raised directly and indirectly in a plethora of additional cases. E.g., *Frame* v. *City of Arlington*, 575 F.3d 432, 434 n.1 (5th Cir. 2009); *Ross* v. *City of Gatlinburg*, 113 Fed. App'x 113, 115 (6th Cir. 2004); *Meagley* v. *City of Little Rock*, 2010 WL 1644687, at *2 (E.D. Ark. Apr. 20, 2010); *Southeast Kan. Indep. Living Res. Ctr.* v. *City of Columbus*, 2010 WL 610135, at *1 (D. Kan. Feb. 18, 2010); *Skaff* v. *City of Corte Madera*, 2009 WL 2058242, at *2–*3 (N.D. Cal. Jul. 13, 2009); *Hanebrink* v. *Adams*, 2009 WL 2413155, at *9–*10 (D.S.C. June 5, 2009), *rejected on other grounds*, 2009 WL 2413087 (D.S.C. Aug. 6, 2009); *Littlefield* v. *Kirspel*, 2008 WL 4015743, at *1 (E.D. Ark. Aug. 25, 2008); *Huezo* v. *Los Angeles Cmty. College Dist.*, 672 F. Supp. 2d 1045, 1051–52 (C.D. Cal. 2008); *Californians for Disability Rights, Inc.* v. *California Dep't of Transp.*, 249 F.R.D. 334, 340–41 (N.D. Cal. 2008); *Reichenbach* v. *City of Columbus*, 2006 WL 2381565, at *3 (S.D. Ohio Aug. 16, 2006); *Cherry* v. *City of College of San Francisco*, 2005 WL 2620560, at *2–*3 (N.D. Cal. Oct. 14, 2005); *Deck* v. *City of Toledo*, 76 F. Supp. 2d 816, 822 (N.D. Ohio 1999); *Matthews* v. *Jefferson*, 29 F. Supp. 2d 525, 539–40 (W.D. Ark. 1998); *Simpson* v. *City of Charleston*, 22 F. Supp. 2d 550, 555 (S.D. W. Va. 1998); *Tyler* v. *Kansas Lottery*, 14 F. Supp. 2d 1220, 1222–23 (D. Kan. 1998); *Schonfeld* v. *City of Carlsbad*, 978 F. Supp. 1329, 1333–34 (S.D. Cal. 1997); *Miller* v. *City*

of Johnson City, 1996 WL 406679, at *7 (E.D. Tenn. May 29, 1996); *Concerned Parents to Save Dreher Park Ctr.* v. *City of West Palm Beach*, 884 F. Supp. 487, 490 (S.D. Fla. 1994); *Tyler* v. *City of Manhattan*, 857 F. Supp. 800, 820–21 (D. Kan. 1994).

Ironically, the City also claims that usually "the transition plan issue is tangential to a main claim focusing on specific barriers to access." City Br. 7. But this observation simply highlights the need for a transition plan: the fact that individuals with a disability must bring challenges to each individual barrier—that they must litigate on a curb-by-curb basis, rather than simply seeking an injunction requiring a transition plan—defeats Congress's goal of providing a map of the minefield, rather than just providing a person a right to sue after stepping on a mine.

II. Congress expressly created the right to a transition plan; it was not the invention of the Attorney General.

A. Congress directed the Attorney General to adopt the transition-plan regulation to implement the ADA's ban on discrimination.

The City's oft-repeated argument on the merits is that § 12134 "cannot be construed as authorizing the Attorney General to create . . . 'rights'" to a transition plan because this construction would "impermissibly allow the Attorney General to play the sorcerer, and not merely the apprentice." City Br. 17. The City is wrong. The Attorney General did not go beyond Congress's intent and create a new right in the transition-plan regulation. Quite the opposite, the Attorney General could hardly have followed Congress's directions more precisely.

Congress expressly directed the Attorney General to adopt regulations that would implement § 12131 through § 12134. 42 U.S.C. § 12134(a) ("the Attorney General shall promulgate regulations . . . that implement this part"). And in the statutory text, Congress specified the content of those regulations: "With respect to 'program accessibility, existing facilities' . . . , such regulations shall be consistent with regulations and analysis as in Part 39 of title 28 of the Code of Federal Regulations." *Id.* § 12134(b). The referenced Rehabilitation Act regulations *specifically require transition plans.* In fact, 28 C.F.R. § 39.150(d) is even entitled "Transition plan."

The Attorney General followed Congress's detailed instructions by adopting regulations that were not merely "consistent with" those Rehabilitation Act regulations, but were in fact substantively identical to the regulations that Congress expressly referenced in the text of § 12134. See Pet. 15–17 (side-by-side chart comparing the two sets of transition-plan regulations). And although the City attacks the specificity of § 12134 by claiming that it does not "expressly reference the particular Rehabilitation Act regulations concerning transition plans," City Br. 18, the opposite is true: § 12134(b) expressly requires that regulations "[w]ith respect to 'program accessibility, existing facilities' . . . be consistent with . . . part 39," and the referenced transition-plan regulation, 28 C.F.R. § 39.150, is titled "Program accessibility: Existing facilities."

Furthermore, even though § 12134 gives the Attorney General some discretion by requiring only that the ADA regulations be "consistent with" the Rehabilitation Act regulations, the Attorney General

did not exercise that discretion. Instead, the Attorney General hewed strictly to the Rehabilitation Act regulations that Congress cited as a template. The City tries to turn this virtue into a vice by noting that "'[c]onsistent with' is not the same as 'identical to,'" City Br. 18, but the City fails to explain how this distinction could undermine the fact that § 12134 expressly directs the Attorney General to promulgate regulations requiring a transition plan. And this failure is for good reason—the Attorney General followed Congress's intent to the letter. See Pet. 15–17 (chart). Indeed, the City's related complaint—that "the statute does not say that *any* regulation promulgated by the Attorney General 'implements' [§ 12132]," City Br. 17—further highlights that Congress was very specific in § 12134 as to the rights the regulations would create.

B. A private right of action to enforce the transition-plan regulation is consistent with *Alexander* v. *Sandoval*.

The concern of this Court in *Alexander* v. *Sandoval*, 532 U.S. 275, 291 (2001), "that language in a regulation [might] conjure up a private cause of action that has not been authorized by Congress," is not present here. Section 12134 expressly states that the transition-plan regulation implements the right of individuals with a disability to be free from discrimination, and § 12133 authorizes a private right of action to enforce that right.

The City attempts to overcome this statutory language by arguing that "the language of [§ 12134] is virtually identical to the 'authorizing' language at issue in *Sandoval*." City Br. 16. This is wrong. The statutory language at issue in *Sandoval*, § 602 of Title VI, directed each federal department to issue

regulations "to effectuate the provisions of section 2000d [i.e., § 601] . . . which shall be *consistent with the achievement of the objectives of the statute*," 42 U.S.C. § 2000d-1 (emphasis added), which this Court interpreted as "prohibit[ing] only intentional discrimination." *Sandoval*, 532 U.S. at 280. That is why this Court held in *Sandoval* that a regulation prohibiting *un*intentional discrimination (i.e., disparate-impact discrimination) went beyond Congress's expressed intent. *Sandoval*, 532 U.S. at 293. In stark contrast, § 12134(b) directs the Attorney General to adopt regulations "consistent with regulations and analysis as in Part 39 of title 28 of the Code of Federal Regulations," which incorporates the requirement of a transition plan designed to promote the accessibility of existing facilities. 42 U.S.C. § 12134(b). That direct reference should be the end of the discussion, as the City does not (and cannot) argue that the ADA transition-plan regulation is inconsistent with the regulations Congress cited.

Congress's intent to create a private right of action under § 12134 is affirmed by the legislative history. Specifically, the House Report that accompanied the ADA states that the rights, remedies, and procedures available under section 505 of the Rehabilitation Act, 29 U.S.C. § 794a (which include a private right of action) "'shall be available with respect to any individual who believes that he or she is being subjected to discrimination on the basis of a disability in violation of any provisions of this Act, *or regulations promulgated under section 204*, concerning public services.'" *Ability Center of Greater Toledo* v. *City of Sandusky*, 385 F.3d 901, 912 (2004) (quoting H.R. Rep. No. 101-485, pt. 2, at 98 (1990),

reprinted in 1990 U.S.C.C.A.N. 303, 381, and adding emphasis).

The City also never disputes that § 35.150(d) is promulgated to implement §§ 12131 through 12134, and not just § 12134. As explained in the petition, the Attorney General stated in § 35.101 that the purpose of the ADA regulations—including § 35.150—is to effectuate the ADA's prohibition on discrimination on the basis of disability. Pet. 14–15; see also *Ability Center*, 385 F.3d at 906 (citing § 35.101 and stating that § 35.151 "was promulgated pursuant to [§ 12134] to effectuate [§ 12132]"). That interpretation is entitled to *Chevron* deference and provides an additional reason to recognize the existence of a private right of action.

C. The First and Sixth Circuits' analysis cannot be reconciled with the statutory text.

Despite the foregoing, the City argues that the decisions of the First and Sixth Circuits demonstrate that the Ninth Circuit reached the correct conclusion. But neither of those decisions can be reconciled with § 12134's plain language.

The Sixth Circuit's decision in *Ability Center* is unpersuasive for two reasons. First, the Sixth Circuit rejected the argument that § 12134 requires public entities to adopt a transition plan not because of the language of the statute, but because of the consequences: "it would follow that all Rehabilitation Act regulations incorporated through Title II would be enforceable through private causes of action, regardless of whether they are even privately enforceable under the Rehabilitation Act and regardless of whether Title II indicated in any other way"—i.e., other than the plain text of

§ 12134—"that it intended to impose the obligation or prohibit the conduct at issue." *Ability Center*, 385 F.3d at 914. But whether a parallel Rehabilitation Act regulation is privately enforceable is a separate question that turns on the language of that Act. What determines whether the ADA regulations are privately enforceable is the language of the ADA. And the Sixth Circuit had no authority to require Congress to state its intent in a second, "other way," when Congress had already spoken clearly in § 12134. In short, the fact that the Sixth Circuit disagreed with the outcome dictated by the plain language did not give it license to deviate from what Congress said. See *Dodd* v. *United States*, 545 U.S. 353, 359 (2005); *Tyler* v. *Cain*, 533 U.S. 656, 663 n.5 (2001) ("[E]ven if we disagreed with the legislative decision . . . we do not have license to question the decision on policy grounds.").

Second, the Sixth Circuit's decision in *Ability Center* is internally inconsistent, as it holds that "plaintiffs do have a private cause of action against defendants for failing to comply with 28 C.F.R. § 35.151"—the regulation immediately following the § 35.150 transition-plan regulation. 385 F.3d at 913. In reaching that conclusion, the Sixth Circuit correctly reasoned that "[o]ther portions of Title II make clear that 28 C.F.R. § 35.151 imposes requirements *specifically envisioned by the statute*." 385 F.3d at 910 (emphasis added). To support that point, the Sixth Circuit relied on the very language in § 12134(b) that controls here: "For instance, Title II states that, with respect to regulations that affect program accessibility and existing facilities, 'such regulations shall be consistent with regulations and analysis as in [28 C.F.R. § 39.101 *et seq.*], applicable to federally conducted activities under [§ 504 of the

Rehabilitation Act]." *Id.* (quoting § 12134(b)) (alterations in original). Thus while the Sixth Circuit correctly applied § 12134 with respect to one regulation (§ 35.151), it refused to apply the same statutory language with respect to the transition-plan regulation (§ 35.150(d)), even though there is no textual reason to treat the two adjacent regulations differently.

Neither the First Circuit's reasoning in *Iverson* v. *City of Boston*, 452 F.3d 94 (1st Cir. 2006), nor the Ninth Circuit's decision below in this case improves on *Ability Center*'s faults. In fact, the First Circuit, like the Ninth Circuit here, never analyzed § 12134, even though the statute specifically requires transition plans. See *id.* at 99–102 (mentioning § 12134 once in passing).

D. The transition-plan requirement is triggered only if a public entity must undertake structural changes to public facilities to comply with the ADA.

Finally, the City makes a policy argument that no private right of action should exist because "a public entity may not have a transition plan, but its facilities may well be free of barriers." City Br. 4; see also *id.* 10–11, 12, & 13. But as explained in the petition, "the transition-plan regulation *does not apply* when a public entity is fully compliant: a transition plan is necessary only '[i]n the event that structural changes to facilities will be undertaken to achieve program accessibility.'" Pet. 21 (quoting 28 C.F.R. § 35.150(d)) (emphasis added). The City never explains why the plain text of the regulation does not answer this concern.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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